IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARK WAYNE CROW, AKA: DONALD JOHN CROW, Appellant.	))))))))))	No. 61361-8-I DIVISION ONE Unpublished Opinion FILED: June 15, 2009

LAU, J. — Police found methamphetamine and other evidence of a drug trafficking operation in a motor home where Mark Crow resided. Crow appeals his conviction for possession of methamphetamine with intent to deliver, contending the affidavit provided by police in support of a search warrant was deficient. We conclude that the warrant was properly issued and that a suppression motion filed by Crow was therefore properly denied. We also reject the other contentions raised by either Crow or his attorney on appeal. Accordingly, we affirm.

FACTS

In October 2007, police were investigating drug trafficking in Island County,

Washington. Using an informant, two controlled buys were arranged between the informant and Crow at an address listed as 25118 State Route 525, Greenbank, Washington. After the second controlled buy, Detective Daniel Todd applied for a warrant to search, among other things, the person of Crow and a motor home located on the property. In his affidavit supporting issuance of the search warrant, the detective described the two controlled buys, indicating that the informant was searched before the buys, '[t]he search proved negative results," and the informant was given prerecorded funds to be used in the controlled buys. According to Detective Todd, the informant "was observed constantly prior to arriving at the above listed property." After each buy, the informant met with police with a purchased substance that "was recognized as methamphetamine." The warrant application also provided,

> The [informant] used to purchase the methamphetamine has made four controlled purchases of methamphetamine, which has resulted in the application of two search warrants, for your affiant. The [informant] has provided accurate information in the past that has been verified by corroborating information received through other confidential informants.

Based on Detective Todd's affidavit, an Island County Superior Court judge issued a warrant authorizing the search of the person of Crow, a fanny pack Crow had at the time of the transactions, and the motor home. The warrant was served shortly thereafter. Upon executing the warrant, the police seized additional methamphetamine, over $3,000 in cash (including six prerecorded bills used in the controlled buys), and other drug paraphernalia.

Prior to trial, Crow moved to suppress the evidence seized during the search, contending that the affidavit failed to state facts sufficient to support a determination of probable cause to believe that evidence of Crow's drug trafficking operation would be found

in the places searched. The trial court denied Crow's motion and allowed the State to present at trial evidence of the items found in the motor home and on Crow's person.

At trial, Crow proposed three separate jury instructions on the definition of "constructive possession"—the trial court declined to give any of those instructions. The jury convicted Crow of possession of methamphetamine with intent to deliver as charged. Crow appeals.

ANALYSIS

Search Warrant Affidavit

Crow challenges the sufficiency of the affidavit filed in support of the search warrant. Crow argues that the trial court erred by denying his motion to suppress items seized from him and the motor home where he lived because the warrant was not based upon probable cause. Thus, Crow argues his conviction should be reversed and dismissed. We disagree.

We review the issuance of a search warrant under the abuse of discretion standard of review. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In so doing, we give great deference to the issuing judge's assessment of probable cause and resolve any doubts in favor of the warrant's validity. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). "However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause." State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Although we generally defer to the judge issuing the warrant, the trial court's assessment of probable cause is a legal conclusion we review de novo. State

v. Chamberlin, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007). The probable cause requirement cannot be met if based on nothing more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

A search warrant should only be issued if the affidavit shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "'[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Crow contends that the warrant affidavit failed to establish probable cause to search the motor home. Because in this case the informant reported that the sales occurred "in an outdoor location," Crow argues that the warrant was issued without establishing probable cause to search the motor home. Crow's reliance on Thein to support his argument is misplaced. In that case, the Supreme Court reversed the defendant's drug conviction, holding that mere conclusory assertions in a warrant affidavit about the common habits of drug dealers were not enough, by themselves, to support the issuance of a warrant to search a suspected drug dealer's residence for contraband. Specifically, the court held that the conclusory assertions in a police officer's affidavit that "'it is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common

residences,'" in the absence of any statements actually tying the defendant's residence to suspected criminal activity, was insufficient to "establish a nexus between evidence of illegal drug activity" and the place to be searched. Thein, 138 Wn.2d at 138-39, 151.

Unlike the affidavit at issue in Thein, the facts asserted in Detective Dodd's affidavit had nothing to do with generalized assumptions about the habits of drug dealers. Instead, the detective's affidavit set forth specific facts to establish the required nexus between the motor home and sale of methamphetamine to the informant such that the judge did not abuse his discretion by issuing the warrant to search the motor home. The affidavit should be interpreted in a "common-sense, practical manner," rather than applying a hyper-technical standard. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). Based on the affidavit, which indicated that Crow sold packaged methamphetamine to the informant from a fanny pack he was wearing, that there was a motor home on the property where the sales took place, and that Crow resided on the property, it was reasonable for the issuing judge to infer that the police would find evidence of Crow's drug activities in the motor home. Hence, the trial court properly refused to suppress the evidence obtained as a result of the search of the motor home.

Crow also attacks the validity of the search warrant on the ground that the affidavit supporting the warrant fails to set forth facts that establish the informant's veracity and basis of knowledge about criminal activity in the places searched as required by Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

The Aguilar-Spinelli test requires the issuing judge to make a threshold determination about whether an informant has truthfully related facts (veracity) and whether an informant has personal knowledge of the facts (basis of knowledge).

The case of State v. Casto, 39 Wn. App. 229, 692 P.2d 890 (1984), is instructive. In that case, the informant reported to police that he could purchase drugs in the defendant's residence. Police then arranged for the informant to make a purchase with marked bills and searched the informant before he entered the transaction. Police maintained surveillance on the informant before he entered the residence. Upon searching him when he returned, police found drugs. The court in Casto explained that a controlled buy is sufficient to establish informant reliability and satisfy both prongs of Aguilar-Spinelli when an informant "'goes in empty and comes out full'" under controlled circumstances, i.e., when police search him for contraband before the buy and observe him en route to the deal. Casto, 39 Wn. App. at 234. By returning from the controlled buy with contraband, an informant "proves the truth of his earlier assertion and establishes his own credibility, at the same time obtaining information for the law enforcement investigation. Such an informant has a reason to be reliable." Casto, 39 Wn. App. at 235.

Here, police conducted controlled buys similar to the one approved of in Casto. According to an affidavit, the informant was searched and given funds to purchase methamphetamine on two separate occasions. After both buys, the informant turned over substances resembling methamphetamine to the police. Because the police searched the informant before the buys and maintained surveillance, the informant's

reliability was sufficiently established under the Aguilar-Spinelli test. The trial court did not err in denying Crow's suppression motion.

School Bus Stop Enhancement

Crow also contends that the State failed to prove beyond a reasonable doubt that he committed his crime within 1,000 feet of a school bus route stop. Thus, Crow argues the school bus stop enhancement must be stricken. We disagree.

"Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation which triggers the enhanced penalty." State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588 (1991). Delivering drugs within 1,000 feet of a school bus route stop designated by the school district subjects an offender to an enhanced penalty. RCW 69.50.435(1)(c).[1] Therefore, our analysis is limited to determining whether the State's evidence was sufficient to establish that the distance between a recognized school bus route stop and the motor home was within 1,000 feet.

At trial, Deputy Davis described using a mechanical measuring device to measure the distance at 574 1/2 feet from the nearest school bus stop to the edge of the property at 25118 State Route 525. The deputy also testified that he had walked all over that property and estimated the pacing distance between the property line and the mobile home to be less than 400 feet. Deputy Davis further testified that he routinely used step pacing as a means of measuring distances when investigating traffic accidents. The combined mechanically measured distance and estimated paced distance is less than 1,000 feet. RCW 69.50.435 does not mandate a particular

[1] The effect of the statute here is to add 24 months to Crow's sentence. RCW 9.94A.510(6).

method of measurement. After viewing the evidence in the light most favorable to the State, we conclude that a rational jury could have found that the two measurements introduced into evidence established that Crow committed his possessory offense within 1,000 feet of a school bus stop and could have provided a basis for the jury to find this element proved beyond a reasonable doubt. In reaching our conclusion, we find it significant that at trial, Crow never challenged the reasonableness of Deputy Davis's distance calculation.

A case cited by Crow, State v. Hennessey, 80 Wn. App. 190, 907 P.2d 331 (1995), is readily distinguishable. In that case, the court concluded that the evidence was insufficient to support giving the school zone enhancement instruction to the jury. Hennessey, 80 Wn. App. at 195. Unlike the situation here, the key witness in Hennessey testified that he was merely "guesstimating" that the relevant distances were less than 1,000 feet. Hennessey, 80 Wn. App. at 195.

Claim of Instructional Error

Crow next argues that the trial court erred when it failed to give at least one of his three proposed instructions defining constructive possession. Instructions are sufficient if they accurately state the law, are not misleading, and permit the parties to argue their respective theories of the case. State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992). A specific instruction is not necessary when a more general instruction adequately explains the law. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997). A trial court has "considerable discretion" in the wording of instructions, State v. Alexander, 7 Wn. App. 329, 336, 499 P.2d 263 (1972), and we review the

rejection of proposed instructions for abuse of discretion. State v. Hall, 104 Wn. App. 56, 60, 14 P.3d 884 (2000).

Here, the trial court did not abuse its discretion in declining to give the proposed instructions. As the court aptly explained,

> I find it unnecessary to give defendant's proposed 11, 12, and 13. They're negative instructions and are not necessary in order to allow the parties to argue their respective theories of the case. Defense counsel can argue the substance of those matters in arguing that there was not dominion and control over the substance by means of constructive possession. So this is all fair for argument, but it's unnecessary to instruct the jury to this effect.

Statement of Additional Grounds for Review

In a pro se pleading, Crow raises a number of arguments that are also raised and addressed by his counsel on appeal. We address only Crow's additional arguments. First, Crow argues that the money taken by police was "fast tracked to a nonjudicial s[e]izure and forfeiture." Since this issue appears to concern matters outside the existing record, he must raise the issue in a properly supported personal restraint petition. State v. McFarland, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

Crow also appears to challenge the sufficiency of the evidence to support his conviction for possession of methamphetamine with intent to deliver. In reviewing such a challenge, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1990).

Crow asserts that he did not commit the crime because the fanny pack did not belong to him and he did not own the property where the search was conducted and the

drugs were found. "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Crow complains that the police officers who testified gave conflicting accounts of what happened during the execution of the search warrant and that their testimony should therefore not be believed. But this court is not in a position to reweigh the evidence. "This court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Applying the proper standard of review, we find the evidence sufficient to convict.

Intent to deliver may be inferred where the evidence shows both possession and facts suggestive of a sale. State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver. State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995). There must be at least one additional fact, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver. Hagler, 74 Wn. App. at 236 (large amount of cocaine and $342 sufficient to establish intent to deliver); State v. Lane, 56 Wn. App. 286, 297–98, 786 P.2d 277 (1989) (ounce of cocaine, large amount of cash, and scales). Here, the large amount of cash, coupled with the methamphetamine and the paraphernalia commonly used for drug sales, support an inference of intent to deliver. The evidence presented was sufficient to convict.

Crow also found "troubling" the fact that the suppression motion was decided by the same judge who issued the search warrant. The case of State v. Chamberlin, 161 Wn.2d 30, 162 P.3d 389 (2007), is instructive. That case also involved a judge issuing a search warrant and denying a suppression motion. In Chamberlin, the Supreme Court rejected a rule of automatic recusal of any judge from hearing a challenge to a search warrant he or she issues. Chamberlin, 161 Wn.2d at 40. In so doing, the court noted that "independent appellate review, the right to file an affidavit of prejudice, and the Code of Judicial Conduct advance the parties' right to a fair and disinterested judiciary and reduce the risk of prejudice." Chamberlin, 161 Wn.2d at 41. Here, as in Chamberlin, Crow has not established that he was denied his right to a fair and impartial trial.

Crow also assigns error to the court's failure to enter timely findings of fact and conclusions of law pursuant to CrR 3.6. Under the rule, however, written findings and conclusions are required only "[i]f an evidentiary hearing is conducted." CrR 3.6(b). With regard to the issue of probable cause to issue the search warrant, the only evidence was Detective Todd's affidavit. There was no testimony taken or any disputed issues of material fact. As previously noted, the trial court gave the reasons concerning its decision to deny Crow's suppression motion on the record. There is no error.

Although by no means clear, Crow also appears to argue that at the suppression hearing, he was denied an opportunity to challenge the witnesses against him in violation of the hearsay rule and his constitutional rights. In this setting, however, probable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial. State v. Huft, 106 Wn.2d 206, 209-10, 720 P.2d 838 (1986);

State v. Patterson, 83 Wn.2d 49, 53, 515 P.2d 496 (1973) (noting that a warrant proceeding does not implicate "such concepts as reasonable doubt, preponderance of the evidence, the competence of the witnesses or defendant's rights to confrontation and cross-examination of the witnesses" and that importing such concepts into the warrant process "would stifle legitimate investigative procedures legitimately to be carried out"). The claim fails.

We affirm.

WE CONCUR: